BEFORE THE ARIZONA CORPORATION C

COMMISSIONERS

JEFF HATCH-MILLER – Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

IN THE MATTER OF THE APPLICATION OF ARIZONA WATER COMPANY, AN ARIZONA CORPORATION, TO EXTEND ITS EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY IN THE CITY OF CASA GRANDE AND IN PINAL COUNTY, ARIZONA	**DOCKET NO. W-01445A-06-0199**
IN THE MATTER OF THE APPLICATION OF PALO VERDE UTILITIES COMPANY FOR AN EXTENSION OF ITS EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY.	**DOCKET NO. SW-03575A-05-0926**
IN THE MATTER OF THE APPLICATION OF SANTA CRUZ WATER COMPANY FOR AN EXTENSION OF ITS EXISTING CERTIFICATE OF CONVENIENCE AND NECESSITY.	**DOCKET NO. W-03576A-05-0926** **REPLY IN SUPPORT OF CP WATER COMPANY'S MOTION TO EXCLUDE ITS CERTIFICATED TERRITORY FROM ARIZONA WATER COMPANY'S REQUESTED EXTENSION AREA** **(ORAL ARGUMENT REQUESTED)**

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Arizona Water Company's ("AWC") opposition to CP Water Company's ("CP") motion to exclude is frivolous, and should be sternly rejected because: (i) CP possesses a valid CC&N issued by the Arizona Corporation Commission in Decision 54089 which remains in effect today; (ii) CP's CC&N can only be revoked after notice and a hearing upon a showing that CP failed to provide adequate service at reasonable rates;[1] (iii) AWC has not alleged (and the facts would not support) that CP's approved rates and charges are unreasonable, that CP failed to provide water service to any person or entity requesting service, or that there has been any allegation that service provided to customers in CP's certificated territory is inadequate; and (iv) AWC's

[1] *James P. Paul Water Co. v. Arizona Corp. Comm'n*, 137, Ariz. 426, 429, 671 P.2d 404, 407 (1983).

opposition to CP's motion is a collateral attack on Decision 54089. Further, AWC has no chance of prevailing against CP on the basis of its frivolous arguments, and CP should not be made to incur additional legal expenses and costs of participating in this docket simply to indulge AWC in a wild goose chase. Moreover, even if AWC's assertions had merit (a point which CP does not concede), a CC&N extension docket is not the appropriate forum to address the extraordinary remedy of revoking a CC&N. Thus, CP requests that the Commission expeditiously grant its motion to exclude its certificated territory from AWC's requested extension area.

I. CP Holds a Valid CC&N Which Remains in Effect Today.

The Commission may issue a CC&N "only upon a showing that the issuance to a particular applicant would serve the public interest." *James P. Paul Water Co. v. Arizona Corp. Comm'n, 137 Ariz. 426, 429, 671 P.2d 404, 407 (1983) (citing Pacific Greyhound Lines v. Sun Valley Bus Lines, 70 Ariz. 65, 216 P.2d 404 (1950)).* The Commission's grant of a CC&N to CP in Decision 54089 means that the Commission specifically found that such issuance to CP served the public interest. Once a CC&N is issued, the certificate holder has a monopoly to serve a specific area and is obligated to serve in that area. *Tonto Creek Estates Homeowners Association v. Arizona Corp. Comm'n, 177 Ariz. 49, 58, 864 P.2d 1081, 1091 (Ct. App. 1993).* In return, the Commission has a duty to protect the certificate holder's exclusive right to serve within the certificated territory. *TRICO Electric Coop., Inc. v. Senner, 92 Ariz. 373, 387, 377 P.2d 309, 319 (1962).* "Only upon a showing that a certificate holder, presented with a demand for service which is reasonable in light of projected need, has failed to supply such service at a reasonable cost to customers, can the Commission alter its certificate." *James P. Paul* at 429, 671 P.2d at 407. "Only then would it be in the public interest to do so." *Id.*

CP holds a validly issued CC&N which remains in effect today. Absent proof that CP has failed to provide adequate water service at reasonable rates, the Commission must protect CP's CC&N and exclude the CP certificated territory from AWC's requested extension area.

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II. There Is No Evidence that CP Failed to Provide Adequate Service at Reasonable Rates, and Therefore, No Basis to Revoke the CC&N.

Under the holding of *James P. Paul*, "[o]nce granted, the certificate confers upon its holder an exclusive right to provide the relevant service for as long as the grantee can provide adequate service at a reasonable rate." *Id.* AWC argues that because AWC provides operational, managerial and other services for CP under the terms of a 1985 Agreement for Operation of Water System (the "Operation Agreement"), CP is "providing no water service." *AWC Response* at p. 3, ln. 16. This, of course, is absurd. Many water companies in Arizona have agreements with outside certified operators and/or professional management companies. To say that these water companies are not providing water service—or that they are not operating as public service corporations—is completely untrue. The relevant issue is whether the certificate holder provides for adequate water service for its customers at reasonable rates, not whether the certificate holder has an operation or management contract with an outside certified operator or management company. AWC would apparently have this Commission revoke the CC&Ns of all water providers which use outside certified operators or professional management companies.

The fact is that CP is ultimately responsible for the adequacy of service in its certificated territory, not AWC. This is clear from the Operation Agreement itself, which states in Section 6 that either party may terminate the agreement on 30 days' written notice. Further, the Operation Agreement states in Section 4 that "AWC does not, by this Agreement, assume any responsibilities and obligations for CP except for duties which AWC expressly agrees to perform hereunder." It is disingenuous for AWC to argue that such an agreement renders AWC the public service corporation. Clearly, if there were a problem with the adequacy of service in the CP certificated territory, the Commission would look to CP and not AWC to address the problem.

No one, including AWC, can say that customers within the CP certificated territory are receiving inadequate water service, or that the rates and charges for service are unreasonable. Rather, the facts regarding CP's performance as a public service corporation are undisputed, and they in no way support the revocation of CP's CC&N:

- CP is a certificated public service corporation in good standing with the Commission.
- CP's rates and charges for service were approved by the Commission, and therefore, are presumed reasonable.
- The Commission has no record in its data base of any customer complaints filed against CP regarding the adequacy of water service, the reasonableness of the company's rates and charges, or any other matter.
- CP has not denied water service to any person or entity requesting service.

AWC did get one thing right in its Response—the Commission has the authority to rescind, revoke or alter all or a portion of a CC&N after proper notice to the affected party and a hearing. However, a CC&N extension docket is not the proper forum for the Commission to undertake such an extraordinary action, even if there were a *bona fide* issue (which there is not) regarding the adequacy of CP's service or the reasonableness of its rates and charges. Also, it should not go unnoticed that AWC said nothing in its extension application regarding CP or the fact that its extension request included the CP certificated territory, even though AWC was clearly aware of CP. When was AWC going to inform the Commission about the CP certificated territory? If AWC was dealing honestly with the Commission and CP, it would have raised its spurious arguments regarding CP in its extension application. The fact that AWC did not demonstrates that even AWC does not take seriously its arguments that CP's CC&N should be revoked. It is obvious that AWC simply buried the 1,320-acre CP certificated territory in its 69,000-acre extension request with the hope that neither the Commission nor CP would notice.

AWC's efforts to usurp the CC&N of CP are particularly egregious because of the contractual relationship between AWC and CP under the Operation Agreement. AWC certainly did not tell CP during the negotiation of the Operation Agreement that AWC would one day seek to take away the CC&N of CP on the basis of that very Operation Agreement. And, AWC certainly did not tell CP at any time during the past 20 years—while AWC was accepting compensation from CP for performing its contractual obligations under the Operation Agreement—that AWC was becoming the public service corporation for the CP certificated territory. Where is AWC's good faith and fair dealing? AWC's attempt to use the Operation

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Agreement after 20 years to wrest away the CC&N of CP is the epitome of bad faith, and should be sternly rejected by the Commission.[2]

Finally, in asking the Commission to revoke the CC&N of CP on the grounds that AWC is providing water service under the Operation Agreement, AWC is asking the Commission to establish a harmful policy. Clearly, such action by the Commission would subject all water providers which employ outside certified operators or management companies to the loss of their CC&Ns. Such a policy would be particularly harmful to the smaller rural providers in the state which are much more likely to rely on outside contractors to operate their water systems.

AWC is not the public service corporation for the CP certificated area, and the Operation Agreement cannot confer that status on AWC. The Commission certificated CP, not AWC.[3] Absent a showing that CP has failed to provide adequate service at reasonable rates, CP has a right to serve the CP certificated territory and the Commission has a duty to protect that right.

III. AWC's Actions Constitute an Unlawful Collateral Attack on Decision 54089.

A collateral attack is an effort to obtain an independent judgment that destroys the effect of another judgment. *Cox v. MacKenzie, 70 Ariz. 308, 219 P.2d 1048 (1950).* AWC's application to extend its CC&N to include CP's certificated territory and its opposition to CP's motion to exclude constitute an unlawful collateral attack on Decision 54089, which is prohibited by statute and legal precedent in Arizona. A.R.S. § 40-252 states: "In all collateral actions or proceedings, the orders and decisions of the [Arizona Corporation] commission which have become final shall be conclusive." More specifically, the Arizona Supreme Court has held that:

> The Commission, in rendering its decisions, acts judicially, and its decisions are conclusive, subject only to a testing thereof in court in the manner provided by statute. In the absence of pursuing such remedy, these decisions are not subject to collateral attack. *Tucson Rapid Transit Co. v. Old Pueblo Transit Co., 79 Ariz. 327, 332, 289 P.2d 406,410 (1955) (citing Arizona Public Service Co. v. Southern Union Gas Go., 76 Ariz. 373, 265 P.2d 435).*

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[2] AWC misrepresents in its Response that CP "failed to disclose the all-encompassing nature of the services that [AWC] provides." *AWC Response* at p. 2, lns. 11-12. This, of course, is laughable as CP attached the Operation Agreement as Attachment "C" to its motion to exclude. In fact, items 1-4 repeated by AWC on page 2 of the Response correspond to items (a)-(d) on page 2 of the Operation Agreement.

[3] AWC has been aware of CP since CP received its CC&N. AWC was a party in the very same docket which produced Decision 54089. AWC received an extension of its CC&N under the same decision. Certainly, AWC said nothing to the Commission at that time that it had designs on the CC&N of CP.

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While it is true that under A.R.S. § 40-252, the Commission "may at any time, upon notice to the corporation affected, and after opportunity to be heard as upon a complaint, rescind, alter or amend any order or decision made by it," the Commission has never taken any action to rescind, alter or amend Decision 54089. AWC's filing of an application to extend its CC&N was not an application to rescind, alter or amend Decision 54089. Thus, Decision 54089 remains in full effect, and CP possesses a CC&N to serve the CP-certificated territory. AWC's attempted sneak-attack on Decision 54089 by surreptitiously including the CP-certificated territory in its extension request is an unlawful collateral attack on Decision 54089. CP's motion to exclude its certificated territory from AWC's requested extension area should be granted.

IV. Conclusion.

CP holds a valid CC&N under Decision 54089 which remains in effect today. Customers in the CP-certificated territory receive adequate service at reasonable rates. AWC has failed to demonstrate otherwise and its opposition to the motion to exclude is an unlawful collateral attack on Decision 54089. AWC has no chance to prevail on these issues and CP should not have to incur the additional legal expenses and costs of participating in this docket simply to indulge AWC in its attempted land grab. For these reasons, CP's motion to exclude its certificated territory from AWC's requested extension area should be granted. CP requests that the Commission's hearing division schedule oral argument on CP's motion at the earliest possible date.

DATED this 30th day of June, 2006.

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